

STATE OF MICHIGAN
IN THE SUPREME COURT

RANDY H. BERNSTEIN, D.P.M.,

Plaintiff-Appellee,

Supreme Court No.: 149032

-vs-

Court of Appeals Docket No.: 313894

SEYBURN, KAHN, GINN,
BESS AND SERLIN, PROFESSIONAL
CORPORATION, a Michigan
Professional Corporation,
and Barry R. Bess, Individually,
Jointly and severally,

Defendants-Appellants.

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PLAINTIFF-APPELLEE'S
BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED****

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STATEMENT OF THE BASIS OF JURISDICTION

Defendants-Appellants, Seyburn, Khan, Ginn, Bess & Serlin, P.C. and Barry R. Bess, appeal from the February 20, 2014, opinion of the Court of Appeals reversing the trial Court's November 29, 2012, opinion and order granting Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(7). (Appendix 5a-12a; 2a-4a). This Honorable Court, having granted Defendants' Application for Leave to Appeal (Appendix 1b), has jurisdiction over this appeal pursuant to MCR 7.301(A)(2) and MCR 7.302(H)(3).

STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals properly apply the continuous generalized relationship doctrine and find that Plaintiff's legal malpractice claim was timely where it was filed within two years after the Defendants discontinued providing generalized legal services to Plaintiff relative to his agreement with Poss to operate a podiatry practice in which they would share equally in the profits?

Plaintiff-Appellee's Answer.....YES.

Defendants-Appellants' Answer.....NO.

Court of Appeals' Answer.....YES.

- A. Does Michigan law recognize and apply the continuous generalized relationship doctrine?

Plaintiff-Appellee's Answer.....YES.

Defendants-Appellants' Answer.....NO.

Court of Appeals' Answer.....YES.

- B. Should the continuous generalized relationship doctrine be repudiated in Michigan?

Plaintiff-Appellee's Answer..... NO.

Defendants-Appellants' Answer.....YES.

Court of Appeals' Answer.....NOT ANSWERED

- C. Did Plaintiff establish that his legal malpractice claim accrued on April 28, 2006, when his continuous generalized relationship with the Defendants ended?

Plaintiff-Appellee's Answer.....YES.

Defendants-Appellants' Answer.....NO.

Court of Appeals' Answer.....YES.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This is a legal malpractice/breach of fiduciary duty action arising out of Berry R. Bess (hereinafter Bess) and Seyburn, Kahn, Ginn, Bess, and Serlin, P.C.'s representation of Plaintiff Randy H. Bernstein, D.P.M. (hereinafter Bernstein) relative to his agreement with Kenneth Poss, D.P.M. (hereinafter Poss) to operate a podiatry practice in which they would share equally in the profits. The facts relevant to this claim are as follows.

Poss initially practiced podiatry as Metro Health Center, P.C., d/b/a Foot Health Centers. In the late 1980's and early 1990's, Poss was under investigation for fraudulent billing practices. (Complaint ¶¶ 6; Appendix 70a). Poss was ultimately convicted of health care fraud in October of 1990 and his license to practice medicine was suspended in March of 1992. (Complaint ¶ 15; Appendix 71a; Appendix 2b).

In 1989, anticipating his suspension and conviction, Poss approached Bernstein, a former employee, with a plan that would allow Poss to retain the economic benefit of his successful practice despite his suspension. (Complaint, ¶¶ 5, 7; Appendix 70a). An agreement was reached between Poss and Bernstein, which was memorialized by notes (Appendix 3b-7b), transactional documents, and testimony. Poss and Bernstein agreed that until Poss' legal problems were resolved that Bernstein would own 100% of the professional practice but that they would split profits 50-50 and that Poss would provide administrative services. They further agreed that when Poss' legal problems were resolved they would be 50-50 shareholders in the corporate entity. (Appendix 110a-112a; Appendix 8b-9b). Bernstein agreed to retain Defendants Berry Bess and his firm Seyburn, Kahn, Ginn, Bess and Serlin to incorporate FHC. (Complaint ¶ 14; Appendix 71a).

On August 8, 1991 Defendants filed paperwork terminating the assumed name Foot Health Centers (hereinafter FHC). (Appendix 17a-21a). Thereafter, on August 15, 1991, Defendants filed the additional paperwork incorporating FHC and naming Bernstein as the sole incorporator. (Appendix 12b-16b).

Although prohibited from practicing podiatry, Poss was able to participate in the business and administrative aspects of the practice. He did so by establishing Diversified Medical Consultants, Inc. (“DMC”). DMC was established the same day as the Foot Health Center assumed name was terminated, August 8, 1991. The legal work was done by the Defendants. Poss was the sole incorporator/shareholder in DMC. (Appendix 13a-16a).

On August 16, 1991, DMC entered into a management services agreement with FHC and Bernstein, individually. (Appendix 22a-32a). Under this agreement, Bernstein was responsible for practicing Podiatry and DMC (Poss) was responsible for managing FHC. They each were supposed to receive 50% of the profits of FHC. The management services agreement was drafted by the Defendants. (Appendix 105a-106a). The agreement gave DMC the sole authority to “select” FHC’s professional advisors for legal and accounting services. (Appendix 23a, ¶2 [m]). The agreement did not give DMC the exclusive right to interact with, control, or direct the services performed by the professional advisors for FHC, a corporation in which Bernstein was the sole shareholder, officer and director.¹

The agreement also provided for an initial term of five years and automatic renewal for successive five year terms, unless DMC provides written notice of DMC’s intent to terminate “not less than six (6) months prior to the end of the then current five year term and each succeeding

¹ Thus, Defendants’ statement that it is undisputed that Poss exclusively controlled the interaction with legal counsel for the corporation is inaccurate.

term thereafter.” (Appendix 28a, ¶6; 29a-30a, ¶ 7). The agreement provided that the president of DMC (Poss) was designated as the attorney-in-fact, coupled with an interest, to effectuate dissolution and liquidation of FHC, “upon termination of this agreement for any reason...”. The agreement expressly delineated the circumstances under which it could be terminated and established that written notice of termination was required. DMC (Poss) could only dissolve and liquidate FHC if the management services agreement was terminated by written notice, which it never was. Therefore, contrary to the Defendants’ assertion DMC (Poss) did not have the authority to terminate and liquidate FHC.²

As anticipated, Poss’ legal problems resulted in his license being suspended in March of 1992. (Appendix 2b). The suspension was for a total of 45 days. (Appendix 111a). In 1992, after Poss’ legal problems were resolved, it was contemplated that the structure of the deal would be finalized as initially agreed to by Bernstein and Poss. Bess wrote a memo dated June 24, 1992 in which he stated:

It is appropriate at this time to complete the corporate structuring on this entity by having Dr. Bernstein be issued stock for 1,000 shares at a price of \$1,000 as of the date of incorporation. The officers for that initial year will be Dr. Bernstein as the sole officer and director. As of June 1, 1992, Dr. Poss shall purchase stock in the corporation of 1,000 shares for \$1,000 and will become a 50% shareholder.

(Appendix 15b).

This document shows that the agreement between Bernstein and Poss called for them to be 50-50 shareholders after Poss’ legal problems were solved. It also shows that Bess was aware of that agreement. (Appendix 15b-16b).

² Defendants’ statement that “[t]he Management Service Agreement expressly and irrevocably designated Poss as the attorney-in-fact for Bernstein and FHC for the purposes of dissolution and liquidation of FHC” is grossly inaccurate. (Appellants’ Brief p. 3).

Despite the fact that Poss regained his license and his ability to practice podiatry in 1992, and despite the June 24, 1992 memo (Appendix 15b-16b), there were no changes to the corporate structure or the management services agreement until 1998. Defendants, however, assert that as of June 1, 1992, Poss served as the sole member of the board of directors for FHC and the corporate president and secretary, that Bernstein served as vice president and treasurer, and Poss became a 50% shareholder. (Appellants' Brief pp 3-4). Defendants rely upon the Consent in Lieu of A Joint Special Meeting of the Shareholders Dated June 1, 1992 to support this factual assertion. (Appendix 35a-38a). The Defendants, however, ignore the fact that this document is an unsigned draft. Moreover, a notation on the document dated 12-18-92 expressly states that "Poss will not be a SH at this time per BRB (Bess)." (Appendix 35a-38a). Indeed, Bernstein will testify that Poss was going through a divorce and did not want to be a shareholder while the divorce was taking place. (Appendix 23b, n5).

Moreover, corporate documents filed by the Defendants as counsel to FHC and Bernstein individually establish that the Corporate structure of FHC did not change prior to 1998. For example, Defendants filed the 1997 annual report for FHC. The 1997 report shows that Barry Bess was the resident agent for the corporation, that the purpose of the corporation was the practice of podiatry, and that the corporations sole shareholder, officer and director was Bernstein. It is signed by Bernstein as president. (Appendix 12b-13b). The 1998 update shows that there were no changes and it was signed by Bess as an authorized officer or agent of the corporation. (Appendix 14b). Through 1998, Bernstein continued to be the sole shareholder, officer and director of FHC.

On December 18, 1998, Defendants began a series of transactions, unbeknownst to Bernstein, which changed his ownership interest in FHC. First, the Defendants filed the necessary paperwork to establish Foot & Ankle Health Centers, P.C. ("FAHC"). Poss was the sole incorporator listed for FAHC. The address of the registered agent was the address of the Defendant law firm and Barry Bess was designated as the registered agent. (Appendix 41a-44a).

Then on January 22, 1999, the Defendants filed a document changing the name of Bernstein's corporation from FHC to Sharon Foot Centers, P.C. (Appendix 45a-47a). The document contains the purported signature of Randy Bernstein on January 15, 1999. Bernstein, however, testified that he never heard the name Sharon Foot Centers, P.C. until approximately a year prior to his deposition, which was taken on May 26, 2010. He further testified that the signature on the document was not his signature. (Appendix 115a).

Also on January 22, 1999, the Defendants filed a certificate of assumed name signed by Poss establishing that FAHC was going to conduct business under the name of Foot Health Centers, P.C. As such, Poss' corporation was now doing business under the same name as the Corporation in which Bernstein was the sole shareholder. (Appendix 37b-38b).

On February 10, 1999, the Defendants filed a Certificate of Amendment-Corporation for Sharon Foot Centers, P.C. which terminated the existence of the corporation as of February 11, 1999. (Appendix 49a-50a). This document also contains the purported signature of Randy Bernstein. Bernstein testified that this is not his signature and that he had never heard of Sharon Foot Centers, P.C. (Appendix 116a-117a). As of February 11, 1999, Defendants terminated the existence of the professional corporation of which Randy Bernstein was the sole shareholder without ever discussing it with him and obtaining his consent. (Appendix 49a-50a).

On May 7, 1999 Bess signed a corporation information update for FAHC which indicates that Bernstein was the President, Secretary, and Treasurer and that Bernstein was the sole director. (Appendix 39b-40b). On February 10, 2000 Bess signed another corporation information update which indicated that Poss was now the President, Secretary, and Treasurer along with being the sole Director. Bernstein was listed as the Vice President. (Appendix 41b-42b). The stock certificates for FAHC, which were prepared by the Defendants, indicate that Poss owned 98% of the shares in FAHC and Bernstein owned 2% of the shares in FAHC.³ (Appendix 43b-47b). The stock certificates are dated January 1, 1999 and they are signed by Poss but they are not signed by Bernstein. (Appendix 43b-47b).

All of these actions creating new corporations and diminishing Bernstein's ownership interest in the ongoing podiatry practice were taken without Bernstein's knowledge or consent. Bernstein testified that he believed the name of FHC was being changed to Foot & Ankle Health Centers to reflect the fact that he (Bernstein) was board certified in foot and ankle surgery, was seeing a lot of ankle cases, and for better advertising. He believed that FHC was still a viable corporation and FAHC was the assumed name. (Appendix 115a). From 1999 to 2006, Plaintiff believed that all profits from the podiatry practice were being divided 50-50 in accord with their agreement and that technically he was still the sole shareholder in the corporation.⁴ (Complaint ¶ 30, Appendix 73a; Appendix 118a; pp 76-79).

³ We know that the stock certificates were prepared by the Defendants because at the bottom of the Foot & Ankle Health Centers, P.C. Record of Stock Issued is a computer tag line showing SKG, i.e, Seyburn, Kahn, Ginn, and the initials BRB for Barry R. Bess. (Appendix 47b).

⁴ It is undisputed by Plaintiff that the agreement between him and Poss always called for the stock to be split 50/50 and that Plaintiff would have agreed at any time to establishing a corporate arrangement in which he and Poss were 50/50 shareholders had he ever been asked by Bess. The fact is that neither Bess nor Poss ever approached him to change the stock ownership after the initial formation of FHC.

Bess signed corporate updates for FAHC in 2001, 2002, 2003, 2004, 2005, and 2006. (Appendix 49b-59b). In 2004 Bess signed a Certificate of Renewal of Assumed Name for FAHC to continue to do business as Foot Health Centers, P.C. through December 31, 2009. (Appendix 58b-59b).

During this time period, the Defendants also did the legal work to establish an entity known as Sunset Boulevard, LLC ("Sunset"). Sunset was established on May 15, 2002. Sunset purchased the building that served as the main location of the three podiatry offices operated by FAHC. (Appendix 52a; Appendix 120a-121a, 130a). All of the corporate filings for Sunset were done by the Defendants and Bess was the registered agent for the corporation throughout the relevant time period. (Appendix 60b-66b). Bernstein has testified that he had a 50% interest in Sunset. (Appendix 120a-121a, 130a). This is consistent with a K-1 from 2005 which indicates that he has a 50% interest in Sunset and that his capital interest at the end of 2005 was \$119,495. (Appendix 67b).

Year end corporate meetings were held between 1991 and 2005, wherein Bess, Poss, Bernstein and the accountant would meet to discuss the previous year as well as other related issues with respect to the podiatry practice. However, in late 2004, Poss was being very secretive with the receipt book and the deposit book for the corporation. Bernstein discussed this with Bess and Bess indicated that he would talk to Poss about the situation. Bernstein testified:

Q. So you're talking about you brought this up with Bess? Is that what you're saying?

A. Yes.

Q. You lost me.

- A. Actually he called me, because what happened is I got into a fight with Poss and I said—he said, well, if you think—I took some days off that he didn't want me to take off, and so the next thing I know I got a call from Barry Bess. He goes, he wants to terminate your relationship. So he started it. He wants to terminate your relationship, you guys' relationship. I'm trying to smooth things out. So we had a couple meetings with Bess regarding this stuff. He said he would take care of it and he never told me about the inequity between the ownership. He never steered me in any direction whatsoever to make me think that anything but—you know, being a 50 percent partner.

(Appendix 123a-124a).

In late 2005, Bernstein began to become suspicious of everything regarding the corporation. Bernstein contacted attorney Ken Gross and asked him to assist in obtaining records from Poss. Gross called Bess twice in late 2005 requesting copies of the corporate records. Bess did not respond to either call and then Gross was instructed to hold off until after the 2005 corporate meeting. (Appendix 68b-70b). At the 2005 corporate meeting Bernstein was told by Dr. Poss that he was only a 2% shareholder in the corporation, but he still did not receive any documents supporting Dr. Poss' claim. The only document he was shown was a financial statement. (Appendix 129a-130a).

In early 2006, Plaintiff was advised that he did not have an interest in Sunset. Again, Defendants failed to provide Plaintiff with any documentation supporting this claim. As of at least June of 2006 all documents in Plaintiff's position, indicated that Bernstein was a 50% shareholder. (Appendix 67b). Apparently, Dr. Poss executed a Promissory Note and Mortgage on behalf of Sunset in favor of himself without any resolution or consent signed by Dr. Bernstein. Poss claimed that as a result of the Promissory Note and Mortgage, Dr. Bernstein no longer had any equity interest in Sunset. (Appendix 72b).

In April of 2006 Bernstein began questioning his continued employment with the P.C. and his continued partnership with Poss and discussed these issues with Bess, his attorney. In response, Bess wrote a letter to Bernstein dated April 28, 2006 outlining Bernstein's legal obligations to the P.C. (Appendix 55a-56a). The letter shows that Bess is still representing the P.C. and he is representing Bernstein. The last sentence of the letter indicates "if you have any questions or require clarification on the above, please contact the undersigned." The letter does not say anything about Bernstein obtaining his own counsel. Attorney Gross responded on Bernstein's behalf on June 5, 2006, which was a direct response to Bess' April 28, 2006 letter. (Appendix 55a-56a).

The parties attempted to negotiate a resolution of their differences throughout the summer of 2006. In June, Poss retained attorney Peter Alter to represent him individually and Bess continued to represent the corporation. On June 27, 2006, Bernstein was finally provided with copies of the incomplete stock certificates signed by Poss, but not Bernstein, showing Poss with an ownership interest of 98% and Bernstein 2% in FAHC. (Appendix 74b-75b). Gross continued to correspond with Alter and Bess throughout July and August of 2006. (Appendix 76b-95b). Ultimately, the negotiations went nowhere and Bernstein has not received anything for his equity interest in FHC, FAHC, or Sunset Boulevard. (Appendix 132a-133a).

Bernstein testified that he looked to Bess as his attorney during the time period that he was engaged in the practice of podiatry with Dr. Poss, which began in 1991 and continued until July of 2006 when Dr. Bernstein severed his association with Dr. Poss and started his own podiatry practice. (Appendix 141a, 145a).

Bernstein filed a multi-count complaint in this matter on April 28, 2008.⁵ The first claim in the complaint was for legal malpractice. The second claim was for breach of fiduciary duty. (Appendix 69a-78a). The Complaint alleges that the Defendants assisted Poss in fraudulently converting Bernstein's 100 percent interest in FHC into a 2% interest in FAHC. Defendants lied to Bernstein and documents were forged in order to carry out the transfer. Eventually Bernstein was forced out of the business and has received nothing for his 100% share of Foot Health Centers, P.C. and the 50% of Foot and Ankle Health Centers, P.C. that he was supposed to own. Defendants were also complicit in Bernstein being deprived of his 50% interest and capital contribution in a separate business entity, Sunset Boulevard, LLC, which owned the principal building that housed the podiatry practice. (Appendix 69a-78a).

On September 11, 2012 Defendants' filed an Amended Motion for Summary Disposition, alleging that they were entitled to summary disposition as the claims set forth in the Complaint were barred by the statute of limitations. (Appendix 96b-110b). The Defendants argued that the specific acts of malpractice alleged by the Plaintiff occurred in 1998, 1999, 2000, and 2002 and that each action triggered its own two year statute of limitations. The Defendants asserted that using the most generous analysis, Plaintiff's complaint would have had to be filed in December of 2002. (Appendix 103a-104a). The Defendants further argued that the breach of fiduciary duty claim was subsumed by the legal malpractice claim and that the same statute of limitations applies. Alternatively, Defendants argued that any independently perfected claims of breach of fiduciary

⁵ This complaint was assigned case #08-091154NM. (Appendix 57a-66a). A stipulated order of voluntary dismissal was entered on December 1, 2008. The order indicated that "IT IS FURTHER ORDERED that any defenses that may arise because of this dismissal or because of the passage of time between this dismissal and a subsequent re-filing are hereby waived contingent upon the re-filing occurring within 30 days of the date of this order." (Appendix 67a-68a). The case was re-filed on December 4, 2008 within the 30 days allowed by the voluntary order of dismissal. (Appendix 69a-78a). Therefore, for statute of limitations purposes, this case was commenced on April 28, 2008.

duty are barred by the three year statute of limitations in MCL 600.5805, and accrued when the alleged wrong was committed and therefore the Complaint had to be filed by December 2, 2005. (Appendix 96b-110b).

Plaintiff responded on October 10, 2012, arguing that the documentary evidence in this case established that the lawsuit was timely filed as to both counts of the complaint. Plaintiff argued that the facts establish the existence of an ongoing attorney-client relationship between Defendants and Bernstein that did not end until sometime after April 28, 2006, making Plaintiff's April 28, 2008 Complaint alleging legal malpractice timely. Plaintiff also set forth facts and case law establishing that the legal malpractice and breach of fiduciary duty claims were separate and distinct, subject to individual consideration as to when the claim accrued under the specific facts of this case. Plaintiff asserted that the breach of fiduciary duty claim was timely as Plaintiff did not and could not have discovered this claim until December 16, 2005. This was due to the Defendants' conduct in concealing the relevant facts from Plaintiff as set forth in Plaintiff's complaint. (Appendix 17b-36b).

Oral argument was held on October 24, 2012. The Court took the matter under advisement. (Appendix 147a, 169a).

Subsequently, on November 29, 2012 the Court issued a written opinion and order granting Defendants' motion for summary disposition. (Appendix 2a-4a). In granting Defendants' motion as to the legal malpractice claim the Court stated:

The Court finds that Defendants discontinued serving Plaintiff as to the matters out of which these claims arose no later than May 15, 2002, when Sunset Blvd was formed. Plaintiff has not shown any relationship between the generalized corporate legal services provided after that date and the specific legal services out of which his malpractice claim arose. Assuming arguendo that Plaintiff could show an ongoing attorney/client relationship dealing with the specific legal services, that relationship would have ended in 2005 when he retained another attorney to investigate the specific legal services and he would have had until 2007 to file a

lawsuit. Therefore the Court finds that Plaintiff's legal malpractice claims are barred by the statute of limitations because he failed to file them within 2 years after they accrued. (Appendix 3a).

With respect to Plaintiff's breach of fiduciary duty claim the Court stated:

The Court agrees with Defendants. The proper test for determining when a claim for breach of fiduciary duty accrues is when the alleged wrong was committed. Plaintiff's claims for breach are clearly untimely having been filed more than 3 years after each breach allegedly occurred. (Appendix 4a).

Plaintiff appealed the trial Court's order granting Defendants' motion for summary disposition arguing that his claims were both timely. Plaintiff asserted that: his legal malpractice claim was timely as it was filed within two years of the date Defendants discontinued service; his fiduciary duty claim was not subsumed by his legal malpractice claim, and was therefore timely as it was filed within three years of discovering the claim, and that plaintiff's complaint was timely pursuant to MCL 600.5855 where the Defendants fraudulently concealed discovery of the claim.

In an unpublished per curiam opinion, the Court of Appeals reversed and remanded this matter back to the trial court. (Appendix 5a-12a). In reaching this decision the Court of Appeals recognized that:

"Special rules have been developed in an effort to determine exactly when an attorney 'discontinues serving the plaintiff in a professional...capacity' for purposes of the accrual statute." *Kloian*, 272 Mich App at 237. For instance, "[a] lawyer discontinues serving a client when relieved of the obligation by the client or the court..." *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994). Other situations require the application of the more general rule that "a legal malpractice claim accrues on the attorney's last day of professional service in the matter out of which the claim for malpractice arose." *Kloian*, 272 Mich App at 238 (quotation omitted).

Furthermore, regarding the date on which a claim for malpractice accrues, the Michigan Supreme Court explained that if a plaintiff receives professional services for a specific event out of which an injury arises, as well as related continuing services, the end of the continuing services, not the specific event, constitutes "the matters out of which the claim for malpractice arose." *Levy v Martin*, 463 Mich 478, 489; 620 NW2d 292 (2001), quoting MCL 600.5838(1). Known as the "last

treatment rule,” this rule applies to all claims against non-medical state licensed professionals. *Id.* at 488. In *Levy*, the defendant accountants prepared the plaintiffs’ annual tax returns from 1974 until 1996. *Id.* at 480-481. After an IRS audit, plaintiffs filed a malpractice suit in 1997 pertaining to tax returns filed in 1992 and 1993. *Id.* at 481. The Michigan Supreme Court held that the plaintiffs’ claim for malpractice did not begin to accrue until the defendants ceased providing generalized tax services to the plaintiffs in 1996 because “rather than receiving professional advice for a specific problem, [plaintiffs] were receiving generalized tax preparation services from defendants. These continuing services...must be held to constitute ‘the matters out of which the claim for malpractice arose.’” *Id.* at 489, quoting MCL 600.5838(1).

Summary disposition pursuant to MCR 2.116(C)(7) was thus inappropriate as to plaintiff’s legal malpractice claim. Plaintiff’s complaint alleges that he retained defendant Bess to incorporate FHC in 1991, and that “[a]t all times, [plaintiff] looked to [defendant] Bess as his attorney and as the attorney for the corporation...” Thus, plaintiff alleges that defendant Bess provided him with generalized legal services. He also alleges that defendant Bess’s malpractice arose out of these generalized legal services, as he asserted that during the course of the representation, defendant Bess committed malpractice by failing to inform that he represented Poss in taking actions that were adverse to plaintiff’s interests. This case is therefore analogous to *Levy*, 463 Mich at 481, 489. Although defendants’ involvement began with a specific legal service for plaintiff—i.e., the formation of FHC—plaintiff alleged that defendant Bess’s services continued as general legal services. And, because the same type of services continued throughout the representation, plaintiff was entitled to rely upon the effectiveness of those services until the relationship terminated. See *Id.* at 485. (Appendix 9a-10a).

Thus, the Court of Appeals held that Defendants did not discontinue providing Plaintiff with general legal services until April 28, 2006, and as such, Plaintiff’s complaint was timely. (Appendix 10a).

The Court of Appeals further held that Plaintiff’s claim for Breach of Fiduciary Duty was not subsumed in Plaintiff’s legal malpractice claim, and that because, the gravamen of Plaintiff’s complaint asserted that the Defendants fraudulently concealed the existence of Plaintiff’s claim for Breach of Fiduciary Duty, Plaintiff is permitted to pursue his claim. (Appendix 10a-11a).

On May 15, 2014, Defendants-Appellants sought leave to appeal from the Court of Appeals’ decision. This Honorable Court granted Defendants’ application for leave to appeal

limited to “the issue whether the plaintiff’s claim for legal malpractice accrued at the time the defendants discontinued the provision of generalize legal services to the Plaintiff and whether those services were ‘the matters out of which the claim for malpractice arose under MCL 600.5838, see *Levy v Martin*, 463 Mich 478 (2001).” (Appendix 1b).

STANDARD OF REVIEW

This Honorable Court reviews rulings on motions for summary disposition and questions of statutory interpretation and the proper application of statutes using a *de novo* standard. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006) (citing *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich. 675, 681; 625 NW 2d 377 [2001] and *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW 2d 201 [1998]). Summary disposition in this matter was sought under MCR 2.116(C)(7). When deciding a motion for summary disposition brought pursuant to MCR 2.116(C)(7) the Court must consider the affidavits, pleadings, and other documentary evidence; must accept all well plead allegations as true and must construe the evidence in a light most favorable to the Plaintiffs as the non-moving party. *Beauregard-Bezou v Pierce*, 194 Mich App 388, 390-391; 487 NW2d 792 (1992); MCR 2.116(G)(5). “Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff’s claim is barred under the applicable statute of limitations.” *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

ARGUMENT

- I. The Court of Appeals properly applied the continuous generalized relationship doctrine and found that Plaintiff's legal malpractice claim was timely where it was filed within two years after the Defendants discontinued providing generalized legal services to Plaintiff relative to his agreement with Poss to operate a podiatry practice in which they would share equally in the profits.**

In the case at bar, the Court of Appeals reversed the trial court finding that under the last treatment rule as codified in MCL 600.5838 Plaintiff's legal malpractice claim filed on April 28, 2008 was timely. In reaching this decision, the Court of Appeals concluded that Plaintiff's legal malpractice claim accrued when the Defendants last provided generalized legal services to the Plaintiff. On appeal this Honorable Court must interpret MCL 600.5838 to determine whether Michigan law recognizes the continuous generalized relationship doctrine, whether this doctrine should be abrogated, and if allowed to stand, whether the doctrine was properly applied in this matter.

A. Michigan law has long recognized and applied the continuous generalized relationship doctrine.

The time for filing a cause of action is established by statute. MCL 600.5805(6) provides that a person cannot bring or maintain a malpractice action unless it is filed within two years after the claim first accrued. A claim based on malpractice other than medical malpractice "accrues at that time that the person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838(1). This statutory provision is known as the last treatment rule.

Beginning in 1990, Michigan Court's recognized the continuous generalized relationship doctrine as part of the last treatment rule. In the case of *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990), the Court first addressed the issue of whether a continuous generalized

relationship could constitute “the matters out of which the claim for malpractice arose” under the last treatment rule. In *Morgan*, Defendant Cooperative Optical Services (COS) contracted with Plaintiff’s employer to provide optical care, specifically yearly eye examinations. *Id.* at 182. In 1981, Dr. Taylor performed an eye examination on Plaintiff which included a glaucoma test. Although the test showed increased intraocular pressure, Plaintiff was not advised to see an ophthalmologist or otherwise advised that the results were abnormal requiring additional evaluation. *Id.* In August, 1983, Plaintiff returned to COS for another routine eye examination because he was now having difficulties with his eyes. *Id.* Another glaucoma test was performed which revealed elevated intraocular pressure. Plaintiff was sent to an ophthalmologist who diagnosed Plaintiff with glaucoma. A glaucoma specialist was then consulted who indicated that Plaintiff sustained irreversible nerve damage and that he should have been referred to an ophthalmologist much earlier than August of 1983. *Id.* at 183.

Plaintiff filed his complaint on January 30, 1985, against COS, and Defendants moved for summary disposition asserting that the statute of limitations had run on Plaintiff’s claim. The trial court denied the motion finding that the August, 1983 examination amounted to a continuation of treatment or services. *Id.* at 183-184. The Supreme Court affirmed the trial courts ruling finding that the Defendant COS provided ongoing treatment and as such Plaintiff’s claim for medical malpractice did not accrue until August, 1983.⁶ In reaching this decision, the Supreme Court noted that:

- The rationale of the last treatment rule is that while treatment continues, the patient relies completely on his physician and is under no duty to inquire into the effectiveness of the measures his/her physician employs. *Id.* at 188.

⁶ Because the legislature eliminated the last treatment rule in medical malpractice actions when it amended MCL 600.5838 in 1986 (1986 PA 178), the ruling was limited to its facts. *Id.* at 194.

- The essence of the last treatment rule is the cessation of the ongoing patient-physician relationship as it marks the end of the air of trust and truthfulness that one has in his/her physician. *Id.* at 188.
- The controlling statutory language of MCL 600.5838 did not distinguish between services related to a specific illness or those services related to ongoing preventative care. *Id.* at 193.

The same year as *Morgan* was decided, the Court of Appeals in *Nugent v Weed*, 183 Mich App 791; 455 NW2d 409 (1990) independently recognized the continuous generalized relationship doctrine in legal malpractice cases. In *Nugent*, the Plaintiff hired Defendant Robert Weed sometime in 1971 or 1972 to provide various forms of legal advice including advice on financial matters. In 1977, while still representing Plaintiff, Weed incorporated his practice becoming Robert G. Weed, P.C. *Id.* at 792-793. Plaintiff fired the Defendant in 1984 when Plaintiff lost a significant amount of money on his investments. *Id.* at 793. Plaintiff then filed a complaint in March, 1986 alleging legal malpractice against Defendant Weed and his professional corporation. *Id.* Defendant Weed argued that the claim against him individually was barred by the statute of limitations as he ceased representing Plaintiff in his individual capacity in 1977 when his corporation was formed. *Id.* at 793. The Court of appeals rejected the Defendant's argument holding:

Defendants do not dispute, and we agree, that, under this provision, Weed remained liable for malpractice committed on behalf of his professional corporation. However, this provision does not operate to save a cause of action against an attorney, individually, that was not timely. Nevertheless, we find plaintiffs' action against Weed, individually, was not time-barred. Under Michigan law, an attorney does not "discontinue servicing" his client for purposes of the statute of limitations until his client or the court relieves him of the obligation or until he completes a specific legal service he was retained to perform. *K73 Corp v Stancati*, 174 Mich App 225, 228-229; 435 NW2d 433 (1988), lv den 432 Mich 897(1989); *Chapman v Sullivan*, 161 Mich App 558, 561-562; 411 NW2d 754 (1987).

In the present case, Weed was not retained to perform any specific legal service. Instead, Weed, either as an attorney practicing individually or as the sole

shareholder of Robert G. Weed, P.C., continuously handled Nugent's various legal and investment affairs from 1971 until March of 1984, at which time Nugent discharged him. The only changes that occurred during the entire course of Weed's representation was the legal form of his practice, a fact which the trial court found to be dispositive.

We do not believe that plaintiffs' claim against Weed should be cut short merely because Weed changed his legal form of doing business. Therefore, we conclude that since Weed never "discontinued servicing" Nugent until March of 1984, plaintiffs' March, 1986, lawsuit, which was timely against the professional corporation, was timely against Weed, individually. *Id.* at 796. (Emphasis added).

In 2001 the continuous generalized relationship doctrine was applied to claims of accounting malpractice in *Levy v Martin*, 463 Mich 478; 620 NW2d 292 (2001). In *Levy*, from 1974 until 1996, Defendant accountants were retained to prepare the annual tax returns for the Plaintiff. *Id.* at 480-481. As a result of an audit, Plaintiff was required to pay additional taxes for 1991 and 1992. The Plaintiff received notice of the deficiency in 1995. *Id.* at 481. Plaintiff filed suit against Defendants in August of 1997 alleging malpractice with respect to the preparation of the 1991 and 1992 tax returns, which were done in 1992 and 1993 respectively. *Id.*

The Defendants filed a motion to dismiss on the basis that the action was not timely. It was Defendants position that the accountant performed discrete accounting services each year which were separate acts, and that any claim for malpractice related to these services, accrued upon the completion of each year's tax return, i.e., a claim related to the 1991 tax return accrued and the two years began running upon completion and filing of the 1991 return, and a claim related to the 1992 tax return accrued upon completion and filing of the 1992 tax return. The circuit court agreed and dismissed the Complaint. The court of appeals affirmed in a two to one opinion with Judge Whitbeck dissenting. *Id.* at 481-482.

The Michigan Supreme Court granted leave and reversed the trial court's order granting summary disposition. The Court rejected the Defendants argument that the relationship between

Plaintiff and Defendants terminated after the preparation of each year's tax return, and upheld the principal outlined in *Morgan v Taylor*, 434 Mich. 180 (1990) that discrete acts that are ongoing and regularly periodic, such as periodic eye examinations offered in fulfillment of a contractual obligation or annual tax return preparation, as took place in *Levy*, are the "matters" out of which the claim for malpractice arises for purposes of the statute, rather than considering the completion of each tax preparation to begin running the statute of limitations with respect to negligence during that singular matter. *Id.* at 488-489, fn 18.

Several facts were significant to the court in reaching its decision. First, the Court noted that Plaintiffs "rather than receiving generalized tax preparation services for a specific problem, were receiving generalized tax preparation services from Defendants. These continuing services, just like the continuous eye examinations in *Morgan*, to be consistent with the *Morgan* approach, must be held to constitute 'the matters out of which the claim for malpractice arose.'" *Id.* at 489. Second, the Court noted that the Defendants had not come forward with any documentary evidence that each annual income tax preparation was a discrete transaction. *Id.* at 489 n 19. (Cf *Old Cf v Rehmann Group*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2012 (Docket No. 307484) (Intermittent audits of financial statements were deemed to be discrete individual accounting services with a defined end point as the service agreement provided that the accountant's engagement ended on delivery of the audit report and that any additional services would be a separate engagement). (Appellants' Exhibit 11). Thus, the Court held that Defendants did not discontinue serving plaintiffs as to the accounting matters until well after the preparation of the 1992 income tax returns. *Id.* n 18.

Over the last twenty-five years Michigan Court's have consistently applied the last treatment rule in malpractice cases based on the nature of the services the professional was

retained to perform. Where the professional is retained to provide services for a specific discrete matter and no additional legal representation is provided in the absence of a separate retention, the claim for malpractice accrues when the specific matter is concluded. See *Cummings v Cohen Law Office*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2014 (Docket No. 314753)⁷; *Anderson v Wierenga*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2012 (Docket No. 301946), *Iden*, 492 Mich 869; 819 NW2d 868 (2012)⁸; *Traynor v McMillen*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2010 (Docket No. 289284); *Masterguard Home Security v Nemes & Anderson, PC*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2010 (Docket No. 291085)⁹; *Boss v Loomis, Ewert*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2010 (Docket Nos 287578 and 289438), *Iden*, 487 Mich 857; 784 NW2d 813 (2010); *Charfoos v Schultz*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2009 (Docket No. 283155); *Wright v Rinaldo's*, 279 Mich App 526, 534-535; 761 NW2d 1114 (2008);

⁷ Where Defendant was retained to represent Plaintiff in claim for personal injury protection benefits after an automobile accident, the claim for legal malpractice accrued when the PIP claim was settled and the Defendant sent a letter confirming the completion of his representation.

⁸ The Court found that where the Defendant was retained to represent Plaintiff in the purchase of an auto dealership, that purchase having been completed in February/March of 2007, and no legal work having been done related to the purchase after that time, the claim accrued in March 2007.

⁹ Plaintiff retained Defendant to represent him in three legal matters. Plaintiff retained Defendant to represent its interest in the sale of a business. The purchase agreement was signed and the sale closed in September, 2001. Seven months later when the purchaser defaulted on payments, Plaintiff retained Defendant to represent him in a breach of contract action, which resolved by way of a settlement in 2002. The settlement agreement required the purchaser to Secure the sellers interest. When the purchaser declared bankruptcy in August, 2005, Plaintiff was an unsecured creditor, and retained the Defendant to attempt to get the company reclassified as a secured creditor. The Court held that Plaintiff was not receiving generalized legal services, but services for the three services Plaintiff specifically retained the Defendant to perform, purchase of company, the breach of contract action, and the bankruptcy classification. As such a claim for malpractice based on the breach of contract action accrued in 2002.

Gould v Huck, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2008 (Docket No. 279538); *Mamou v Cutlip*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2008 (Docket No.275862), *Iv den*, 483 Mich 912; 762 NW2d 505(2009), reh den (6/23/09); *Kloian v Schwartz*, 272 Mich App 232, 238; 725 NW2d 671 (2006), *Iv den*, 477 Mich 1124; 730 NW2d 244 (2007); *Alken-Ziegler, Inc v George, Bearup & Smith*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2006(Docket No.264513); *Balcom v Zambon*, 254 Mich App 470, 484; 658 NW2d 156 (2002); *Estate of Mitchell v Dougherty*, 249 Mich App 668, 684; 644 NW2d 391 (2002); *Dettlopp v Dald, Spath & McKelvie*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 1998 (Docket No. 199426). (Appellants Exs 1-10).

However, if the professional is retained to and in fact provides generalized, ongoing, and periodic services, the claim for malpractice accrues when the ongoing relationship is concluded. See *RL VIC, Inc v Dawda, Mann*, unpublished opinion per curiam of the Court of Appeals, issued March 7, 2006 (Docket No. 265167); *Azzar v Tolley*, unpublished opinion per curiam of the Court of Appeals, issued November 2, 2004 (Docket No. 249879) *Iv den*, 474 Mich 922; 705 NW2d 349 (2005); *Maddox v Burlingame*, 205 Mich App 446, 450-451; 517 NW2d 816 (1994), *Iv den*, 448 Mich 867; 528 NW2d 735 (1995); *Kutlenios v Unum Provident Corp*, 475 Fed Appx 550, 554 (6th Cir,2012); *Gold v Deloitte & Touche*, 405 BR 830, 839-845 (Bank Crt, ED Mich 2008); *Ameriwood Indus Int'l Corp v Arthur Anderson & Co*, 961 F Supp 1078,1092-1094 (WD Mich, 1971).

Defendants, however, argue that this Court should repudiate this long standing rule and instead hold that pursuant to MCL 600.5838 a legal malpractice claim accrues on the “last date of the specific negligent acts or omissions at issue.” (Appellants’ Brief, p 34). Plaintiff respectfully disagrees.

B. The continuous generalized relationship doctrine should not be repudiated.

Resolution of the issue whether the continuous generalized relationship doctrine should be repudiated as argued by the Defendants hinges on the meaning of the phrase “discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose” as set forth in MCL 600.5838. As this phrase was not statutorily defined, its meaning is left to judicial interpretation.

As a general rule, the primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. *In the Matter of The Estate of Flynn*, 181 Mich App 570, 573; 450 NW2d 77 (1989). Words of the statute are to be assigned their ordinary meaning unless it appear from the context of the statute or otherwise that a different meaning was intended. *Phipps v Campbell*, 39 Mich App 199, 216; 197 NW2d 297 (1972). Thus, statutory terms cannot be viewed in isolation, but must be construed in accordance with the surrounding statutory text and the statutory scheme. *Breighner v Michigan High School Athletic Ass’n, Inc.*, 471 Mich 217, 232; 683 NW2d 648 (2004)

1. *Review of the Statutory Scheme*

MCL 600.5838 was part of the statutory scheme enacted as part of the Revised Judicature act of 1961. 1961 PA 236. Prior to 1961, the general common law rule was that a claim accrues at the time of the injury. *See Dyke v Richard* 390 Mich 739; 213 NW2d 185 (1973). The Revised Judicature act of 1961 statutorily defined when causes of actions accrued. In non-malpractice actions, “the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damages results.” MCL 600.5827. In malpractice actions against members of a state licensed profession, a claim “accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to

the matters out of which the claim for malpractice arose.” MCL 600.5838. This statutory provision initially established the accrual date for all malpractice actions recognized at common law, including medical malpractice actions.

In 1986, MCL 600.5838 was amended to create a separate accrual rule for medical malpractice claims. 1986 PA 178. MCL 600.5838 as amended provided that “[e]xcept as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose...” MCL 600.5838a, as referenced in MCL 600.5838 provided that “a medical malpractice claim accrues at the time of the act or omission that is the basis of the claim for medical malpractice...” MCL 600.5838a(1). Thus, the legislature chose to abrogate the last treatment rule in medical malpractice actions only. The last treatment rule and all it encompassed continued to apply to all other malpractice claims including legal malpractice.

In 2012, the legislature again amended MCL 600.5838. 2012 PA 582. MCL 600.5838 now provides that “except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose...” MCL 600.5838(1). The newly added MCL 600.5838b provides:

- (1) An action for legal malpractice against an attorney-at-law or a law firm shall not be commenced after whichever of the following is earlier:
 - (a) The expiration of the applicable period of limitations under this chapter.
 - (b) Six years after the date of the act or omission that is the basis for the claim.

The purpose of this statutory provision was to create a statute of repose for legal malpractice actions.

2. *The Continuous Generalized representation doctrine is consistent with the legislative intent, the statutory scheme, and the express statutory language of MCL 600.5838.*

The legislative intent in enacting MCL 600.5838 was to codify the Court's holding in, *DeHaan v Winter*, 258 Mich 293; 241 NW 923 (1932),¹⁰ the case where Michigan judicially recognized the last treatment rule. In *DeHaan*, Plaintiff employed the Defendant to set and treat his broken leg. *Id.* at 295. The court in *DeHaan* held that the statute of limitations did not begin to run while the physician-patient relationship continued which, in this case, was until such time as the treatment for the fracture ceased. *Id.* at 296.

In reaching this decision the *DeHaan* Court relied on *Schmit v Esser*, 183 Minn 354; 236 NW 622 (1931) which stated that “where the physician is employed generally to treat and effect a cure his duty continues until the relation terminates; that the treatment does not include merely the immediate and isolated resetting or reduction or adjustment of a fracture or a dislocation, but all subsequent care and treatment essential to recover.” *Id.* at 358. The reasoning in *DeHaan* and *Schmit* establishes that the touchstone for determining the last treatment is the termination of the on-going professional relationship relative to the services for which the professional was retained.

In enacting MCL 600.5838, the legislature used language broad enough to encompass claims based on both specific services and generalized services. MCL 600.5838 provides that a malpractice claim (other than medical malpractice) “accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to

¹⁰ The Committee Comment to MCL 600.5838 states that “Section 600.5838 is based on the rule stated and followed in the Michigan case of *DeHaan v Winter*, 258 Mich 293.

the matters out of which the claim for malpractice arose.” MCL 600.5838(1). As recognized by the Supreme Court in *Levy*, the use of the plural “matters” instead of the singular “matter” is a recognition that “a claim against a state licensed professional does not begin to run when the professional ceased providing services with regard to a single matter. On the contrary the statute of limitations begins to run only when the professional has ceased providing services as to the broader matters out of which the claim arises.” *Id.* at 489, n 18. Thus, the statutory language of MCL 600.5838 as used by legislature and as judicially interpreted is in keeping with the legislative intent behind the last treatment rule.

Defendants’ argue that the last treatment rule codified in MCL 600.5838 should be interpreted as meaning that a legal malpractice claim accrues at “the last date of the specific negligent acts or omissions at issue.” (Appellants’ Brief, p 34). This interpretation which essentially applies the same accrual rule to both legal and medical malpractice actions is contrary to the statutory scheme at issue.

The Legislature clearly chose to apply different accrual rules to legal malpractice and medical malpractice actions. MCL 600.5838 as originally enacted applied to all malpractice actions. 1961 PA 236. The Revised Judicature Act was amended in 1986 to expressly create separate accrual rules for medical malpractice actions. See MCL 600.5838a; 1986 PA 178. The new statutory language provided that in medical malpractice actions only, a claim “accrues at the time of the act or omission that is the basis for the claim of medical malpractice.” MCL 600.5838a(1). The last treatment rule, as codified in MCL 600.5838 and judicially construed, continued to apply to other claims of professional malpractice. MCL 600.5838. In so doing the Legislature knowingly chose to continue to apply the broader last treatment rule to the accrual of non-medical malpractice actions. Any construction of MCL 600.5838 that would essentially

apply the same rule as set forth in MCL 600.5838a to legal malpractice actions would be contrary to the Legislative intent and would render MCL 600.5838a a surplusage.¹¹

Moreover, the Legislature has never amended the Revised Judicature Act to in any way alter the judicial interpretation of the last treatment rule, including the continuous generalized relationship doctrine, in the context of non-medical malpractice actions. It has long been recognized that the Legislature is presumed to be aware of judicial interpretations of existing laws when passing legislation.” *People v Likine*, 492 Mich 367, 398 n 61; 823 NW2d 50 (2012); *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006); *Dean v Chrysler Corp*, 434 Mich 655, 668, n19; 455 NW2d 699 (1990).¹² Although the continuous generalized relationship doctrine has been recognized in Michigan as part of the last treatment rule for over twenty-five years, the legislature has taken no action to repudiate or alter this rule in legal malpractice actions. The Legislature instead choose to repeal the last treatment rule as it applied to medical malpractice actions only, 1986 PA 178, and to create a statute of repose which would limit the last treatments rule’s effect of prolonging the time for filing a legal malpractice action. 2012 PA 582.

Public Policy Underlying the Statute of Limitations Does Not Warrant Repudiation of the Continuous Generalized Treatment Doctrine.

In support of their argument that the continuous generalized relationship doctrine as part of the last treatment rule should be repudiated, Defendants assert that this rule conflicts with the

¹¹ One of the cardinal rules of statutory construction is that the “court does not interpret a statute in a way that renders any statutory language surplusage.” *Williams v Kent*, 278 Mich App 47, 57; 748 NW2d 583 (2008).

¹² The Michigan Legislature has acted to amend MCL 600.5838 to correct judicial interpretations of this statute which they found not to be in keeping with the legislative intent. As originally enacted MCL 600.5838 applied to claims of malpractice against “a person who is, or holds himself out to be, a member of a state licensed profession.” 1961 PA 236. Thereafter, the Michigan Supreme Court held that MCL 600.5838 did not apply to claims against nurses or hospitals as the nurses’ employer. The Court determined that a claim for malpractice under the Revised Judicature Act could only be brought against a profession that could have been sued for malpractice under the common law, because the legislature did not intend to broaden the class of individuals against whom a malpractice claim could be brought. Therefore, because nurses could not be sued for malpractice at common law, claims against nurses were subject to the general negligence provisions. See *Kambas v St. Joseph’s Mercy Hosp*, 389 Mich 249; 205 NW2d 431 (1973). Two years later, the Legislature amended MCL 600.5838 so that it provided that:

(1) A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession, *intern, resident, registered nurse, licensed practical nurse, registered physical therapist, clinical laboratory technologist, inhalation therapist, certified registered nurse anesthetist, X-ray technician, hospital, licensed health care facility, employee or agent of a hospital or licensed health care facility* who is engaging in or otherwise assisting in medical care and treatment, or any other state licensed health professional... 1975 PA 142.

public policy underlying the statute of limitations by allowing stale claims which may be difficult to defend. This argument is not persuasive for two significant reasons.

First, the last treatment rule recognizes that claims may be brought based on claims that are far in the past. As the Defendants noted, statutes of limitations represent “a legislative determination of that reasonable period of time that a plaintiff will be given in which to file an action. *Lothian v City of Det*, 414 Mich 160, 165; 324 NW2d 9 (1982). Here, because MCL 600.5838 expressly adopted and continues to recognize the “last treatment” rule in the context of non-medical malpractice actions, Michigan’s legislature has made a determination that it was proper to continue to apply the “last treatment” rule to claims of professional negligence other than medical malpractice. The Michigan Supreme Court has previously recognized that MCL 600.5838(1) allows suits against nonmedical professionals based on alleged negligence that had occurred much further in the past than would be the case absent the statutory provision and stated that, “for better or worse, we believe an extended statute of limitations is precisely the point of MCL 600.5838(1); as currently enacted.” See *Levy*, 463 Mich at 490. As the Court is obligated to apply statutes in light of their plain meaning, any policy arguments that support changing the statute must be addressed to the legislature,. *Id.*

Second, in 2012 the Legislature in fact addressed the potential problem of stale claims for future legal malpractice claims. As amended in 2012, MCL 600.5838 now provides that “except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose...” MCL 600.5838(1). The newly added MCL 600.5838b provided that a legal malpractice claim had to be commenced at the earlier of the

applicable period of limitations or six years after the date of the act or omission that is the basis for the claim. MCL 600.5838b(1). This statutory amendment established a statute of repose in legal malpractice actions which effectively resolved the policy concern related to stale claims.¹³

3. *Stare Decisis Mandates Against the Overruling of Martin and Levy or the Continuous Generalized Relationship Doctrine.*

The Defendants' request that this Honorable Court repudiate the continuous generalized relationship doctrine is essentially asking this Court to overrule *Morgan*, 434 Mich 180; *Levy*, 463 Mich 478; and its progeny which recognized this doctrine as part of the last treatment rule. Overruling this long standing rule of law is contrary to *stare decisis*.

"*Stare decisis* is short for *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm." *Petersen v Magna Corp*, 484 Mich 300, 314 ;773 NW2d 564 (2009). This doctrine balances between the need for stability in legal rules and decisions and the need of the court to correct past errors. *Id.* For this reason *stare decisis* is "generally 'the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *People v Tanner*, 469 Mich199, 250; 853 NW2d 653 (2014) (citing *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 [2000]).

However, "*stare decisis* is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions...". *Robinson*, 462 Mich at 463. As such the Court has established various factors to consider in determining whether prior precedent should be overruled. Those factors include whether the earlier decision was incorrect, whether the decision

¹³ The Legislature's recognition that a statute of repose was needed is also an acknowledgement that the last treatment rule could result in claims that are based on actions that occurred many years in the past.

defies practical workability, whether reliance interest would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision. *Id.* at 464 (citations omitted). Under these factors, overruling the precedent in the case at bar would be improper.

As discussed at great length above the, the holdings in *Morgan*, 434 Mich 180; *Levy*, 463 Mich 478; and its progeny recognizing the continuous generalized relationship doctrine as part of the last treatment rule were not wrongly decided. This doctrine is consistent with the statutory scheme, the express language of the statute and the intent of legislature. Moreover, any public policy concerns regarding the possibility of stale claims are moot as they have been addressed by the Legislature. (See Argument 1(a) *supra*).

The continuous generalized relationship doctrine, as part of the last treatment rule, does not defy practical workability. Indeed for the last twenty five years, Michigan Courts have been readily been able to apply the rule. (See Argument 1(b) *supra*).

Reliance interests would work an undue hardship if this doctrine was overruled. In assessing reliance interests “the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental to everyone’s expectations that to change it would produce...practical real world dislocations.” *Robinson*, 462 Mich at 466. For twenty-five years the continuous generalized relationship doctrine has been recognized as part of the last treatment rule and has extended the accrual date for legal malpractice actions. To overrule this long standing rule would essential shorten the statute of limitations on numerous legal malpractice claims, and claims that could have been otherwise timely pursued under the continuous generalized relationship doctrine would now be barred. This would work an incredible injustice on individuals who relied on this longstanding and well recognized rule of law.

Finally, there have been no changes in the law or facts which would render the continuous generalized representation doctrine as not justified. The statutory language of MCL 600.5838 from which this doctrine was derived has remained unchanged since its original enactment. This is true despite the fact that the legislature presumptively was aware of the judicial interpretation and application of this rule. See *Ford Motor Co v City of Woodhaven*, 475 Mich at 439-440. Indeed, recent amendments to the Revised Judicature Act, specifically the enactment of MCL 600.5838b, support the continued application of this doctrine. (See Argument 1(b)(2) and (3), *supra*).

4. Should this Honorable Court Overrule the Continuous Generalized Relationship Doctrine, Any Such Decision Should Be Applied Prospectively.

Assuming arguendo that this Honorable Court abrogates or overrules the continuous generalized relationship doctrine and adopts the Defendants' interpretation of the last treatment rule, any application of this rule should be prospective only. The interpretation of the accrual rule as set forth in MCL 600.5838 directly effects the statute of limitations. Under Michigan Law statutes of limitations are prospectively applied. *Davis v State Emples Ret Bd*, 272 Mich App 151, 162-163; 725 NW2d 56 (2006).

Additionally, Michigan Court's review three factors which should be weighed in determining whether a statute or rule of law should not have retroactive application: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). Under the factors established by Michigan Court's retroactive application is not proper in this case.

The purpose of any new rule adopted by this Court would be to correct an erroneous interpretation of MCL 600.5838. Michigan Court's recognize that under these circumstances prospective application serves the purpose of the new rule. *Id.* at 697.

There has been extensive reliance on the old rule. Again, as previously discussed, the continuous generalized relationship doctrine has been recognized and followed by litigants and Michigan Courts for over twenty-five years. Prospective application would acknowledge this reliance.

Finally, the retroactive application of any new rule of law affecting the accrual of legal malpractice claims would have significant negative impact on the administration of justice. Any decision by this Court to overrule or abrogate the this long standing continuous generalized relationship doctrine would essential shorten the statute of limitations on numerous legal malpractice claims, and claims that could have been otherwise timely pursued under the continuous generalized relationship doctrine would now be barred. Thus, retroactive application of any newly announce rule would divest not only the Plaintiff's in this case but numerous other past victims of legal malpractice of their vested right to seek redress for their injuries .

C. Plaintiff Established that His Legal Malpractice Claim Accrued On April 28, 2006, When His Continuous Generalized Relationship With the Defendants Ended

As set forth more fully above, under Michigan law, an attorney discontinues serving a client in a professional capacity for purposes of the accrual statute when the attorney is relieved of his obligation by the client or the court or when he completes the specific legal service for which he was retained. *Nugent*, 183 Mich App at 796. However, where a professional (other than a medical professional) is not retained for a specific transaction or service, but instead provides continued generalized services, the last date of service for the purpose of accrual of a malpractice claim is the date on which the continuing services end. See *Morgan*, 434 Mich 180; *Levy*, 463 Mich 478; *Nugent*, 183 Mich App 791.

Here, Plaintiff's claim of legal malpractice arises out of generalized legal services Defendants provided relative to Plaintiff's agreement with Poss to operate a podiatry practice in which they would share equally in the profits. Bernstein testified that he looked to Bess as his attorney during the time period that he was engaged in the practice of podiatry with Dr. Poss, which began in 1991 and continued until Dr. Bernstein severed his association with Dr. Poss in 2006, and started his own podiatry practice. (Appendix 141a, 145a). During this time, there was an air of trust between Bernstein and Defendants. Bernstein made it clear that the only reason he entered into any agreement with Dr. Poss was because he treated Bess. (Appendix 108a). This belief was supported by the ongoing services provided by Defendants.

Defendants incorporated FHC, of which Bernstein was a sole shareholder in 1991, and also incorporated Poss' management company which was necessary in order for Poss, whose medical license was to be suspended, to receive the profits. Thereafter, from 1991 until sometime after April 28, 2006, Defendants continuously provided Bernstein with generalized legal advice and

services related to their podiatry practice. Defendants prepared legal documents to incorporate and transfer stock in a variety of corporate entities under which Bernstein continuously provided podiatry services from 1991 until July of 2006. Defendants formed Sunset, an entity which purchased the building which housed the podiatry practice, of which Bernstein was to be a 50% shareholder. Defendants held annual year end corporate meetings where they provided legal advice and services to Bernstein and Poss related to the podiatry practice. These were meetings held at Defendants' office on a yearly basis. While Bernstein attended all these meetings, Bernstein testified that Poss and Bess had conducted the majority of the meeting before he arrived, and he would hear mainly the conclusion. If Bernstein had questions related to the podiatry practice he called Bess. Bernstein also testified that throughout the year Bess came to the podiatry practice to discuss legal issues related to the practice and have Bernstein sign documents related to the podiatry practice. (Appendix 128a, 145a).

The preparation of yearly tax returns in *Levy* is very similar to the holding of year-end corporate meetings as took place in this case.¹⁴ Just like in *Levy*, Plaintiff, rather than receiving professional advice for a specific problem, was receiving continuous and generalized legal services related to the podiatry practice and the closely held professional corporations. Plaintiff did not come to Defendants with a specific discrete legal request (with the exception of his estate planning matter), but instead, was receiving continuous generalized legal services related to his business venture with Poss. Consistent with the Michigan Supreme Court's analysis in *Levy*, these

¹⁴ The difference in this case is that Bess did much more than just hold year-end corporate meetings.

continuing services, must be held to constitute “the *matters* out of which the claim for malpractice arose.” *Id.* at 489.¹⁵

The Defendants argue that a malpractice claim accrues at the completion of each individual discrete professional act. Defendants’ argument fails on two significant grounds. First, as set forth more fully above, the legislature did not choose to incorporate this type of accrual rule in the context of non-medical malpractice actions. Instead, the legislature knowingly continued to apply the “last treatment rule.”

Second, the Michigan decisions upon which the Defendants rely to support their argument are all factually distinguishable from the case at bar. *Chapman v Sullivan*, 161 Mich App 558; 411 NW2d 574(1987), the primary case relied upon by the Defendants, involved a legal malpractice case where the client hired the attorney to represent her in the sale of a restaurant and tavern business in 1981. Plaintiff alleged that defendant improperly drafted one or more documents of the sale, failed to protect a securing interest in certain personal property, and failed to draft the reassignment agreement which would reassign the liquor license if the purchasers defaulted. It was uncontroverted that the defendant rendered no legal services to plaintiff after July 1981. The file had been closed and the matter was completed. *Id.* at 561-562.

The Plaintiff filed suit in May of 1986. The Defendant filed a motion for summary disposition alleging that the date he last rendered legal services to Plaintiff was July 1981, and thus a claim for malpractice arising out of legal services regarding the sale of the business, must have been filed by July 1983. Plaintiff alleged that the cause of action did not accrue until

¹⁵ See also, *Nugent v Weed*, 183 Mich App 791; 455 NW2d 409 (1990), as an example of a case in which the defendant attorney was not retained to perform any specific legal service, but instead, the attorney continuously handled Plaintiff’s various legal and investment affairs from 1971 until March of 1984, at which time Plaintiff discharged him.

April 11, 1984, the date the purchasers filed their bankruptcy petition, i.e., the date Plaintiff suffered damages. *Id.* at 559-560.

In holding that the cause of action accrued in July 1981, the court of appeals stated that “the defendant was retained by plaintiff to perform specific legal service, i.e., to advise and represent her in the sale of her business and draft certain documents in connection with the sale.” *Id.* at 561. The court noted several times that it was uncontroverted that defendant rendered no legal services to plaintiff of any kind after July, 1981. Specifically the court stated, “There is no dispute that defendant completed all work on plaintiff’s behalf and closed the file in July, 1981. *At that point, there was no ongoing litigation or relationship between the parties and both considered the matter closed.* These facts are not controverted.” *Id.* at 564, fn2 (emphasis added).

These facts are completely distinguishable from those in the present case. In *Chapman*, the Plaintiff retained the Defendant for a specific legal service. The Defendant completed the task and closed the file. In *Chapman*, there was no evidence of an ongoing relationship after he closed the file in 1981. There was a three year period of time where the Defendant did not perform any legal services for the plaintiff prior to the development of problems with the contract that had been drafted. *Id.* at 561-562. Moreover, the Court of Appeals has referred to the rule set forth in *Chapman* “as an exception to the general rule” which only applies in instances where the attorney is retained to perform a specific legal service, and where there is no evidence of an ongoing relationship following the completion of the specific legal service. *Mitchell v Dougherty*, 249 Mich App 668, 683, fn 6; 644 NW2d 239 (2002).

Defendants argue that Plaintiff’s assertion that his claim against the Defendants arise out of a generalized, routine, and on-going legal service to the same client defies logic because Defendants services were related to the formation and dissolution of three different corporate

entities. The Defendants argument, however, ignores that fact that all the work done by the Defendants was to effectuate the agreement between Bernstein and Poss relative to their podiatry partnership.

Defendants argue that Plaintiff did not have an actual attorney client relationship with the Defendants. This argument is premised on two assertions. First, Defendants assert that the Management Agreement “conferred exclusively upon Poss/DMC the authority to retain and instruct legal counsel for FHC.” (Appellant’s Brief p 45). This is factually inaccurate. The agreement gave DMC the sole authority to “select” FHC’s professional advisors for legal and accounting services. (Appendix 23a, ¶2 [m]). The agreement did not give DMC the right to interact with, control, or direct the services performed by the professional advisors for FHC, a corporation in which Bernstein was the sole shareholder, officer and director.

Second, Defendants assert that the corporate legal services Defendants rendered between 1991 and 2005 were distinct from the services provided to Bernstein and could not be used to establish an ongoing relationship between Bernstein and Defendants, because the professional relationship with respect to those services was with the corporation only and not with Bernstein individually. In support of their position they cited, *Beaty v Hertzberg & Golden PC*, 456 Mich 247, 260; 5712 NW2d 716 (1997); *Prentis Family Foundation, Inc v Karmanos Cancer Inst*, 266 Mich App 39, 44; 698 NW2d 900 (2005); and *Scott v Green*, 140 Mich App 384, 397, 400; 364 NW2d 709 (1985). This argument is untenable.

Generally, when an attorney represents a corporation, the attorney’s client is the corporation, and not its shareholders. *Fassihi v Sommers Schwartz, Silver, Schwartz & Tyler, P.C*, 107 Mich App 509, 517-518; 309 NW2d 645 (1981). However, *Fassihi* does not stand for the position that an attorney representing a corporation cannot also be representing the shareholder

personally. *Id.* In *Yatooma v Zousmer*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2012 (Docket No. 302591) (Appendix 111b-117b) the Court stated, “[t]he fact that an attorney represents a corporation does not preclude the attorney from additionally representing a shareholder personally.” *Id.* at *4 (Appendix 113b). See also, *Neuffer v Pelavin Powers P.C.*, unpublished opinion per curiam of the Court of Appeals, issued Oct 26, 2001 (Docket No. 219639) (Appendix 118b-120b) wherein this Court stated:

We agree that the trial court erred to the extent it relied on *Fassihi* [citation omitted] for the proposition that because defendants represented the corporate entity Tri-County News, no attorney-client relationship with plaintiffs could exist. This Court in *Fassihi* did not hold as a matter of law that an attorney who represents a corporation may not ever simultaneously represent an individual shareholder, but merely noted that in light of ‘the general proposition of corporate identity apart from its shareholders,’ a corporate attorney’s client is the corporation and not the shareholders. *Id.* at *2-*3 (Appendix 118b-120b).

The allegations and the evidence in this case support the finding that Defendants represented Bernstein and Poss individually to effectuate the partnership agreement between Bernstein and Poss to carry on the business of a podiatry practice for their shared profit. The facts show that Defendants represented the various corporate entities under which Bernstein and Poss operated their business from 1991 until July of 2006. Defendants incorporated FHC for Bernstein in 1991 and continued to provide legal services to Bernstein thereafter. If Bernstein had any questions related to the podiatry practice he called Bess. Bernstein testified that he looked to Bess as his attorney throughout the time Poss and Bernstein were doing business together. (Appendix 145a). Defendants met with Bernstein annually to discuss any legal issues related to the Poss-Bernstein business venture.

Defendants further argue that even if the facts demonstrate an ongoing relationship, Defendants effectively discontinued serving Plaintiff in 2005 when Plaintiff consulted with his longtime attorney/friend Kenneth Gross, to assist him in obtaining corporate records and documents, when he became suspicious of Dr. Poss. In support of this argument Defendant cited *Wright v Rinaldo*, 279 Mich App 526; 761 NW2d 114 (2008). Defendants' reliance on this case is misplaced.

Wright, involved a legal malpractice claim related to a patent application. Plaintiff retained defendant in August 2000 to represent plaintiff in a patent application. During the summer and fall of 2002 Plaintiff became unsatisfied with defendant's work. By October of 2003, plaintiff began to consult with another patent attorney and ultimately directed them to undertake all work for the patent. *On December 18, 2003 Plaintiff signed a document that revoked Defendants power of attorney and at the same time executed a power of attorney to the new counsel.* Plaintiff filed the legal malpractice action on February 16, 2006. The Defendant moved to dismiss based on the statute of limitations. The dispositive question was when Plaintiff effectively terminated Defendants representation of him in this patent application. The trial court granted the motion on the basis that the attorney client relationship ended on December 18, 2003.

On appeal the Court noted that the plaintiff's knowledge of the Defendants alleged malpractice clearly proceeded the last day of service and that the operative date is the date of Defendant's last service as Plaintiff's attorney. The parties disagreed about the date of last service. The Court held that the attorney client relationship ended on December 18, 2003, when Plaintiff hired other attorneys to handle his patent application, executed documents revoking her power of attorney, and granted one of his new lawyer's power of attorney to represent him in the patent application process. Importantly, the evidence established that Plaintiff began to consult

with the other attorney in October of 2003, however, the court did not find, nor is it the law, that consultation with another attorney terminates a relationship with the prior lawyer. *Maddox, supra* at 451. Instead, it was Defendants act of revoking his prior attorney's power of attorney, and appointing new counsel to perform future work on the patent which effectively terminated the relationship. The court noted that from the time Plaintiff signed that document he had Defendant perform no work on the patent prosecution.

These facts are clearly distinguishable. While it is true that in late 2005 Plaintiff *consulted* with an attorney to assist him in obtaining corporate documents, there is certainly no evidence that he terminated his relationship with Defendants at that time, or that he intended that result. In fact, Defendants continued to provide legal services pertaining to matters out of which Plaintiff's claim arose, i.e., advice related to the business venture with Dr. Poss, until at least April 28, 2006, when Defendants advised Plaintiff of his legal obligations as a result of his resignation. (Appendix 55a-56a). Further, Defendants did not produce any evidence, similar to the documents presented in *Wright*, which established as a matter of law, that Plaintiff terminated his relationship with Defendants prior to April 28, 2006. In fact, the evidence available clearly establishes otherwise.

The facts of this case are more akin to *Maddox*, 205 Mich App 446. In *Maddox*, the Court held that the plaintiff's consultation with another attorney did not terminate the attorney client relationship with the defendant. The court noted that the evidence established that the attorney was not consulted in place of, but in addition to, defendant. Just as in *Maddox*, there is no evidence as of April 28, 2006, that Plaintiff substituted Defendants with attorney Gross.

Thus, the Court of Appeals properly found that Plaintiff's legal malpractice claim was not time barred. The evidence demonstrates that from 1991 to April 28, 2006, Defendants were providing Plaintiff with continuous, general, and ongoing legal services relative to effectuating the

agreement between Bernstein and Poss to operate a podiatric practice in which they would share equally. Therefore, Plaintiff's April 28, 2008 Complaint alleging legal malpractice related to these legal services was timely and summary disposition was not proper.

RELIEF REQUESTED

For these reasons, Plaintiff-Appellee respectfully requests that this Honorable Court affirm the Court of Appeals' decision finding that Plaintiff's legal malpractice claim was timely filed within two years after the Defendants had discontinued providing continuous generalized legal services to Plaintiff.

Respectfully submitted,
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Dated: March 12, 2015

STATE OF MICHIGAN
IN THE SUPREME COURT

RANDY H. BERNSTEIN, D.P.M.,

Plaintiff-Appellee,

Supreme Court No.: 149032

-vs-

Court of Appeals Docket No.: 313894

SEYBURN, KAHN, GINN,
BESS AND SERLIN, PROFESSIONAL
CORPORATION, a Michigan
Professional Corporation,
and Barry R. Bess, Individually,
Jointly and severally,

Defendants-Appellants

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PROOF OF SERVICE

LINDA ROBERTS, deposes and says that she is employed at the law firm of SOMMERS
SCHWARTZ, P.C. and further says that on the 12th day of March, 2015, she served a copy of:

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL **ORAL ARGUMENT REQUESTED**
and **APPENDIX ON BEHALF OF PLAINTIFF-APPELLEE**

through the Court's TrueFiling system, to the following:

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